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IN THE

Supreme Court of the United States

October Term, 1967

No. 708

CLOUDIES SHINALL,

Petitioner,

v.

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

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No.

CLOUDIES SHINALL,

Petitioner,

v.

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on May 15, 1967, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at 199 So. 2nd 251 and is appended hereto (in Appendix A) *infra*, at page 1a.

Jurisdiction

The judgment of the Supreme Court of Mississippi affirming the conviction of petitioner in the Circuit Court of Forrest County was entered on May 15, 1967.

A Suggestion of Error was overruled on June 12, 1967. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28 U.S.C. § 1257(3). Application for an extension of time to file this petitioner to and including October 10, 1967, was granted in an order issued by Mr. Justice Black dated September 5, 1967. . .

Statutes Involved

MISSISSIPPI CODE ANN. 1942

§ 2215. Homicide, murder, defined.

The killing of a human being, without the authority of law, by any means or in any manner, shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, arson or robbery, or in any attempt to commit such felonies.

Section 2218(f)

Homicide—justifiable homicide: The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases: . . .

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a

felony or do some great person injury, and there shall be imminent danger of such design being accomplished.

§ 2225. Homicide—killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

Questions Presented

1. Whether the due process clause of the Fourteenth Amendment is violated where the State, by judicial fiat, prevents an accused from defending himself against a capital charge?

2. Whether a conviction and death sentence procured after indictment and trial by grand and petit juries which did not reflect a cross-section of the community, from which women were excluded by statute and Negroes excluded by reason of their race, violates the equal protection and due process clauses of the Fourteenth Amendment?

Statement

Prior Proceedings:

Petitioner was convicted of deliberate murder as defined in § 2215, Miss. Code Ann. (1942) on August 6, 1966. He appealed to the Supreme Court of Mississippi which affirmed the conviction and subsequently on May 15, 1967 overruled his Suggestion of Error. Petitioner prays that this Honorable Court issues a writ of certiorari to review the judgment against him.

Evidence Presented:

Petitioner, a Negro youth, was nineteen years of age at the time of his indictment, and a resident of Palmer's Crossing, a Negro community adjacent to Hattiesburg, Mississippi. He was convicted of the murder of Frederick L. Humphrey, a white constable of Forrest County, Mississippi. The jury did not recommend mercy and the death penalty was imposed.

Petitioner was arrested on March 27, 1965; a preliminary hearing was not held until April 13, 1965 and he was originally arraigned on July 15, 1965. He has been incarcerated in penal institutions of the State of Mississippi since March 27, 1965.

Humphrey's death occurred on March 26, 1965, in Palmer's Crossing, an area within the official jurisdiction of former constable, Wilmer Kitchens. Although Humphrey was officially assigned to another beat, he and Kitchens operated as a team in Kitchens' beat or assigned area which encompassed Palmer's Crossing (R. 722-23; 766; 1110; 1112; 1254). Together, the two pursued a pattern of harassment, intimidation, abuse and brutality toward the Negro citizens of Palmer's Crossing (R. 796-97; 1224-25; 1236; 1177-80; 1221-23; 1234-36; 1260). It was the practice of the two constables to frequent the restaurants and cafes in Palmer's Crossing (the only places of recreation in the area) and arrest the male patrons or occupants for various reasons, generally of an insubstantial nature. Under Mississippi law, constables received increased remuneration based upon the number of arrests made. (Section 3949, Miss. Code Ann. 1942). Significantly most arrests were made on Saturday evening, pay day in the community (R. 1254; 1280).

A week prior to Humphrey's death, he had arrested petitioner and others and charged them, indiscriminately, with gambling and/or profanity. In the course of the

arrest Humphrey pushed petitioner about and attempted to slam the car door on his leg. During the drive to the jail, both Kitchens and decedent threatened petitioner (R. 1299-1300). The arrest was made in the usual manner resorted to by the Humphrey-Kitchens team; Kitchens remained outside shining his flashlight in the window, indicating who should be arrested, and Humphrey entered the building and took into custody those designated for arrest (R. 1077; 1254).

On the afternoon of March 26, 1965, petitioner borrowed a car from one L. C. Leggett for the purpose of picking up his pay check (R. 923). During most of the day he was accompanied by James Anderson and Lewis Willie Smith; the three rode about the Palmer's Crossing neighborhood, where they stopped at two or three cafes, the last of which was "Bammer's Place," the combined home and business place of a Mrs. Bammer Madison. Sometime during the course of the drive, Leggett's gun encased in holster and attached to a belt, became dislodged from under the front seat of the car and was discovered by the three occupants shortly before they entered "Bammer's Place" (R. 969-970). Petitioner had no prior knowledge of the gun's existence nor of the fact that Leggett kept it in his car under the seat. Anderson and Smith testified that petitioner wore the holster while in "Bammer's Place" and that the episode had been in the context of a joke, devoid of serious implications (R. 1066; 1094). Constables Kitchens and Humphrey drove up to "Bammer's Place" while the three were inside; Kitchens entered and left within a few minutes. Before Kitchens entered, petitioner had removed the holster and given it to Mrs. Madison who returned it after Kitchens departed. The holster and gun were replaced under the front seat of the car (R. 1096).

The appearance of the constables in "Bammer's Place" precipitated a conversation among the occupants, includ-

ing petitioner, concerning a recent incident of harassment by decedent. At approximately 6:00 p.m. on that same evening Lewis Perkins and several other young men were in another cafe when Kitchens and Humphrey entered it. Although there was no evidence of gambling the group was accused and taken outside. While Humphrey was searching some of those detained, Perkins ran around the house whereupon Humphrey shot at him twice (R. 1197-1198). Humphrey then proceeded to another cafe, the "Blue Flame" and boasted that he had just "shot at some niggers" (R. 1207).

The trial court excluded from the jury the testimony of Charles Hall, an employee at the "Blue Flame". Between 6:30 and 7:30 the same evening, shortly after firing his pistol at Perkins, Humphrey appeared with Kitchens at the "Blue Flame" cafe where they asked for and were served a pint of gin. Hall testified that the two contables "split" the pint, consuming it mixed with orange juice (R. 1306-19). Humphrey then proceeded to the "Heat Wave."

After dark, shortly before 8:00 p.m., petitioner together with Smith and Anderson, left "Bammer's Place" in the borrowed car intending to pick up Leggett from his place of employment (R. 1097). As the car approached a point in the road adjacent to the "Heat Wave", petitioner reduced his speed in an attempt to traverse a ditch in the road. The unrepaired road caused the car to stall twice (R. 1026). While petitioner was attempting to restart the car and continue his errand, Humphrey emerged from the "Heat Wave", approximately 15 feet to the rear of the car and directed his flashlight toward it (R. 979). Petitioner succeeded in starting the car, whereupon Humphrey promptly got into Kitchens' car which was parked in front of the "Heat Wave", and began to pursue petitioner's car, flashing the official red light (R. 984, 1100, 1113). As Humphrey continued the chase, petitioner began to pursue a circuitous route.

Anderson who testified that Leggett's car "took off fast," and explained that he referred not to the speed of the vehicle but to the fact that the tires spun on the gravel road as the car started (R. 1026). Leggett testified that his 1956, nine-year-old Chevrolet car with a hydromatic transmission was incapable of starting fast (R. 942). Smith's conception of speed was based upon fear occasioned by the pursuing vehicle (R. 1129-30).

From the point where the car had stalled petitioner traveled approximately 150 yards left onto another road; he proceeded to the next intersection, turned right into a dirt road and proceeded for approximately another two hundred yards; he made two additional turns and as he attempted to round a sharp curve, the car went out of control and came to a stop in the driveway of the home occupied by the family of Andrew Wilborn (R. 1029-33).

The highest speed reached by petitioner, according to the testimony of Anderson, was between 50-55 miles an hour; this occurred at the end of the ride, on the gravel road. The legal speed limit provided in Section 8176, Miss. Code Ann. 1942 is 60 miles per hour. Both Smith and Anderson testified that they had all been frightened because of the unprovoked pursuit of the car by Humphrey (R. 1029-30; 1060). Smith stated that he was frightened because the constable was following the car even though they had done nothing and testified further that he knew Humphrey would put them in jail without regard to infractions of the law (R. 1114-5).

Constable Humphrey, who had continued his pursuit of the car, stopped his vehicle at a right angle to that of petitioner, got out of the car and approached the other vehicle a lighted flashlight in one hand and his drawn gun in the other. He ordered the occupants out of Leggett's automobile. Anderson testified that both he and Smith got out of the car at the command of the constable; Smith testified that he was out of the car before Humphrey

reached it. After both had alighted, Humphrey leaned into the car. Anderson heard a shot. Smith saw a blaze of gun fire and both immediately ran from the scene. Neither Smith nor Anderson saw a shot fired but testified to having heard three shots fired within a period of 35-40 seconds (R. 1102-03; 1105). A slug which entered Humphrey's throat caused his death.

Leggett, Anderson and Smith were arrested the next day, and were kept in custody in jail until their appearance at the trial. All three testified that they had seen petitioner later in the evening of March 26. According to Leggett, his entire conversation with petitioner was confined to petitioner having volunteered the information that he had killed an "s.ob.", naming Humphrey. Anderson spent several hours with petitioner; their only conversation consisted of petitioner stating that after Humphrey fell, he walked up to him and "shot the s.o.b. in the head" (R. 1008). Smith who met and talked to petitioner at the same place as did the other two, said there was no conversation about any shooting (R. 1074).

Andrew Wilborn, age fifteen, who heard the approach of the two automobiles and looked out of his front window, established that Humphrey was not shot after he fell. The perimeter of the illuminated area did not extend to the place where petitioner's car had stopped. Wilborn testified that he heard the two cars stop but could only see the trouser legs of Humphrey as he walked into the yard. Wilborn heard three shots fired in sequence. A man whom he later determined to be Humphrey ran onto the porch, asked for help, turned, walked off the porch and fell to the ground. At the time Humphrey fell to the ground, the only car in the area was that driven by Humphrey. No shots were fired after Humphrey fell (R. 1146-47; 1149). Petitioner made no attempt to leave Palmer's Crossing; he was arrested the next day in a home in that area.

Fundamental to petitioner's defense was his apprehension for his life at the time Humphrey approached the car. Despite this fact the trial court refused to admit into evidence testimony showing the basis for this apprehension. Thus, although one witness was allowed to testify that both constables worked together "mostly on weekends" and to her knowledge of incidents in which the decedent abused and beat Negroes (R. 1289). The court excluded most of the proferred evidence bearing upon this defense. For example, there was excluded the testimony of Sheriff Gray that he had received complaints from the residents of Palmer's Crossing relating to the misconduct of the constables of mistreatment of petitioner by the decedent and Kitchens, and of the unlawful assaults of females by the two constables (R. 797-800; 16a-18a). Leggett attempted to testify that prior to March 26, 1965, Humphrey and Kitchens had sent bullets to petitioner together with a threatening message, but he was precluded by the Court from describing the incident (R. 946).

The jury was not permitted to hear testimony of witnesses as to continuous unprovoked indiscriminate beatings of Negroes in Palmer's Crossing by the decedent nor was there allowed Mrs. Madison's graphic description of how decedent had physically abused a woman whom he was attempting to arrest in her business place. Similarly, the Court excluded testimony by petitioner's mother Mrs. Shinall, Mildred Adams and E. D. Sullivan of their personal experiences of unprovoked physical attacks by decedent (R. 1205; 1227; 1260; 1269). The testimony of Mrs. Adams and Mr. Sullivan as set forth in the Appendix B is an example of the tenor of the excluded evidence (19a-32a). Additionally there was proffered through witness Madison evidence of an unmerciful beating administered to petitioner by Kitchens, the event which apparently commenced the vendetta evidenced by the later threats to petitioner by the decedent and Kitchens (R. 1223-241). Mrs. Mary

Jones proffered testimony on an occasion that when she tried to explain that a boy, whom Constable Kitchens was trying to question, had failed to respond because of a speech defect, she was struck, arrested and charged with intefering with an officer (R. 1264-65). Mrs. Flora Jane Russell proffered testimony that while sitting in their automobile, she and her husband were arrested by the decedent and taken to jail. While Humphrey detained Mr. Russell at the jail, Kitchens and two of his cronies took Mrs. Russell in the official vehicle to a wooded area and attacked her.[1] The significance and importance of these facts is clear; they establish the existence of a pattern or abuse of citizens by the decedent and Kitchens and that these incidents were well known in the community; as a result there was general and well founded fear of the two constables (R. 1179; 1182; 1157). Evidence of the prevailing reign of terror within the community is directly relevant to the reasonableness of petitioner's apprehension—a statutory element of his lone defense.

The total population of Forrest County was judicially noticed to be 52,722. Of that total, 37,970 are white; 14,719 are Negro; accordingly, Negroes constitute 26% of the county's population according to the 1960 census (R. 63). Prior to the January, 1965, terms of the Circuit Court, no members of the Negro race had ever served on a grand jury. Since that time two Negroes served for the July Term, 1965; three Negroes served for the November Term, 1965; for the March Term, 1966 two Negroes served and at the July Term, 1966, four Negroes served. No women have ever served on grand or petit juries (R. 61).

Thereon Lynd, circuit clerk of Forrest County, testified that the names of eligible grand and petit jurors are placed

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[1] Mrs. Russell has testified to this incident on two occasions. As yet no criminal charges have been filed against Kitchens who has been relieved of his office partially as a result of Sheriff Gray's investigation of his activities.

in boxes by members of the Board of Supervisors (R. 66). The supervisors file a list; both the slips to be placed in the boxes and the lists are kept in his other office, *i.e.*, the clerk's office. The lists are prepared from poll books and there are 59 poll books for the county with separate books for each beat or district (R. 67). Lists are prepared at various times during the year, the times apparently determined by the particular supervisors involved and the needs to be met. Lynd estimates the racial breakdown of registered voters after July, 1965, to be 16,000 whites and 2,500 Negroes. According to records filed by Lynd as a result of an injunction requesting him to cease refusing Negroes the right to register, Lynd had registered 1,445 Negroes. The judge has never authorized the Board of Supervisors to place the names of freeholders in the jury selection boxes (R. 75).

There are separate boxes kept for each beat in the county. Of each 12 men drawn by the sheriff for jury duty, five are drawn from Beat 1, two from Beat 2, three from Beat 3, one from Beat 4 and one from Beat 5 (R. 66). Lynd stated that the poll books do not reflect the race of the voters.

The Chancery Court of Forrest County, Clyde Easterling, clerk of the Board of Supervisors, testified that each of the Board members prepares the slips reflecting qualified jurors from qualified voters in the poll boxes and that poll books are the only source used for the selection of jurors (R. 76). He does not check the slips placed in the boxes against the lists but certifies the slips which are tendered by Board members as a matter of course (R. 77).

The same method of selection employed for years in the past is used. William Sigler, Supervisor of District 1, Beat 1, testified that of the approximately 16,000 persons registered in the county, half are from his district. Approximately half of the qualified electors are women (R. 86). He prepares his lists by taking the names in alphabetical order from each poll or precinct book. He lists between 50

to 100 persons at one time (R. 80). As each precinct book is exhausted alphabetically, he proceeds to another. As a result, for two or three successive terms jurors from certain precincts are not called by reason of his method of selection. Accordingly, jurors are not made available from the entire county or on a broad basis at each listing (R. 81). He excludes from his lists those who have served on juries during the past two years and all women. Despite the requirements of § 1766 of the Mississippi Code, Ann. that supervisors in making a list "shall select and list the names of qualified persons of good intelligence, sound judgment and fair character," he makes no effort to determine who the jurors are and is of the opinion that his method accords with the statute. He does not place freeholders on the lists, only qualified electors (R. 82-83). Five of each twelve prospective jurors selected during a term come from his beat.

J. A. P. Carter, Supervisor of District 4, testified that prior to elimination of the poll tax, he had between 750 and 1,000 qualified electors in his district (R. 90). His method of selection is similar to that of Supervisor Sigler. Supervisor Carter testified that he includes 20, 30 or 40 names at each listing but never as many as 100 (R. 89). His list is prepared from the four precinct books in his district and he proceeds alphabetically through each book. He selects no minimum or maximum number; he stated that when he gets "tired," he "quits" (R. 90). He eliminates from the list persons who have served during the past two years and women, and makes no investigation nor any effort to determine who the persons are that are selected (R. 91).

Two white Hattiesburg attorneys testified for the State. Rex K. Jones, a member of the Legislature who has been practicing in Hattiesburg since 1961, stated that he tried two criminal cases in the "past year" where Negroes sat as petit jurors (R. 95). In many instances, he has excused them (R. 96). Robert Lennon, who has practiced in Hattiesburg for two years (since 1964), testified that

he had defended a Negro female named Rosemary Burton for[1] murder and that one or two Negroes remained on the petit jury (R. 98). He "imagined" that the State had peremptory challenges remaining at the time. In two non-capital cases, one for grand larceny and burglary and the other for narcotics, he "allowed" two Negroes to sit on the jury (R. 99). Despite the stipulated and judicially acknowledged fact that no Negroes had served as grand jurors prior to January, 1965, both Lennon and Jones recalled Negroes sitting on grand juries prior to that date (R. 96; 98).

Procedure Below: Preservation of Federal Questions:

Petitioner's pre-trial motion to quash the indictment because of discriminatory selection of grand jurors, exclusion of Negroes and women from that panel and denial of a preliminary hearing for some 17 days in violation of his rights to due process and equal protection of the laws granted by the state and federal constitution was overruled (R. 6-7; 100-101). A special venire drawn for trial in this case was exhausted and an existing list of jurors was used to complete the selection of the jury (R. 425). Petitioner's motion to quash the special venire, the venire and the petit jury empaneled in this cause was based upon discriminatory selection of jurors, and failure of the jury selection system to produce a representative cross section of the community. The motions, citing violations of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, were denied (R. 121-125; 160; 280-81; 491; 662).

Petitioner requested the right to make an opening statement in order to delineate the defense of self-defense. The motion was overruled (R. 615; 679-680). Throughout the

[1] Case No. 6454 from the docket books of the Circuit Court of Forrest County reflected the case of Burton v. State which concerned the trial of a Negro for having killed another Negro.

trial, where evidence relating to justifiable homicide was excluded, petitioner pressed and explained his objections; all were overruled (R. 1220; 1231; 1238; 1250). Exceptions to these rulings, due process violations, were included with all other issues raised in the motion for directed verdict at the conclusion of the trial (R. 1322-23). At the termination of the state's case, petitioner moved for a directed verdict delineating, among the grounds cited unconstitutional jury selection process in violation of the Fourteenth Amendment and failure to prove the case beyond a reasonable doubt (R. 1322-23). Included in this motion was the argument that there was insufficient evidence of *deliberate* murder as set forth in § 2215, Miss. Code Ann. (1942) (R. 1135-37; 1323). The motion was denied (R. 1323). This motion for a directed verdict which included all grounds previously stated to the Court was renewed at the end of petitioner's case; the motion was denied (R. 1323).

Preserved within the objections and motions made during the course of the trial was the failure of the Court to excuse a juror for cause (R. 647); use of a hypothetical question not limited to the facts in evidence; admission of evidence and exhibits relating to wounds sustained by the decedent which did not result in his death (R. 862) and errors in instructions rendered by the Court (R. 1347-55)[2]. The profusion of errors was urged as sufficient to constitute denial of due process of law and the motion was similarly denied (R. 1323).

After judgment of conviction and imposition of the death penalty, petitioner moved to set aside the verdict or

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[2] The State of Mississippi utilizes a procedure for instructions whereby each side submits requested instructions to the Court. They are subsequently reviewed by the Court and prosecutor, then ruled upon by the trial judge. The charges are read to the jury by the counsel offering them only in the form submitted so that there is no opportunity for explanation by the court.

for a new trial incorporating all grounds previously raised. Cited specifically was failure of the State to prove deliberate murder, the offense charged in the indictment; and insufficient evidence to warrant conviction for deliberate murder because petitioner had acted in self-defense. This motion was denied on August 9, 1966 (R. 1356-60, 1361). Petitioner moved for and was granted an appeal in *forma pauperis* on August 19, 1966 (R. 1365).

Assignments of Error were filed with the Supreme Court of Mississippi preserving all objections raised below. The Supreme Court of Mississippi ruled on a single federal question, whether the totality of proceedings in the case violated petitioner's right of due process of law under the Fourteenth Amendment. It found no violation of the Fourteenth Amendment on that limited basis but did not specifically rule on other federal questions presented (12a).

Reasons for Allowance of Writ

1. The judgment of conviction for murder by deliberate design (for which the death penalty has been imposed) secured by denying petitioner his right to defend himself, constitutes a deprivation of due process of law in the most elementary sense and conflicts with the *ratio decedendi* of *Washington* v. *Texas*, — U.S. —: 18 L.ed. 2d 1019; 35 L.W. 4675 (decided June 12, 1967). The right to defend against a capital crime is so integral a part of our concept of ordered justice that denial or impairment of the right is, *a fortiori*, a deprivation of due process of law. *In re Oliver*, 33 U.S. 257, 69 S. Ct. 499 (1948); *Hovey* v. *Elliot*, 167 U.S. 409, 17 S. Ct. 841 (1897); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106, 54 S. Ct. 330 (1934).

In *Washington* v. *Texas, supra*, this Court held that the confrontation clause of the Sixth Amendment included the right to offer testimony, and ". . . in plain terms the right to present a defense, the right to present the defendant's

version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." This Court continued:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

For directly related reasons, the prosecution is constitutionally precluded from the use or introduction of false evidence and from suppression of exculpatory facts. Convictions obtained through employment of these methods cannot stand consistent with the Fourteenth Amendment. *Miller* v. *Pate*, — U.S. —, 87 S. Ct. —; 17 L.Ed. 690; *Mooney* v. *Holahan*, 294 U.S. 103, 55 S. Ct. 340 (1955); *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1954); *Alcorta* v. *Texas*, 355 U.S. 28, 78 S. Ct. 103 (1954). In its review of these cases, this Court has been cognizant of the irreparable adverse effect of such evidence upon a convicting jury disabled, by the State, from affording a fair hearing. *Douglas* v. *Alabama*, 380 U.S. 415, 420, 85 S. Ct. 1074 (1965); *Alcorta* v. *Texas, supra.* The denial of due process inherent in such proceedings results from the State's interference with the "fair and impartial hearing" requisite to a valid conviction. A "fair and impartial hearing" is the very bedrock of the Sixth Amendment and mandates inclusion of the protection intended by that Amendment within the due process clause of the Fourteenth Amendment.

Washington v. *Texas, supra,* abrogated a procedural statute which disabled the defendant from eliciting testimony in his defense from a co-defendant. Because the effect of this rule was to inhibit and deny the right to defend, it violated federal constitutional guarantees. This thesis is consistent with the decisional authority developed

by this Court and reflected in *Lisenba* v. *California,* 314 U.S. 219, 62 S. Ct. 280 (1941).

> The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession (314 U.S. at 236).

See also *Fahy* v. *Connecticut,* 37 U.S. 85, 84 S. Ct. 229 (1963).

The fundamental principles of justice secured by the due process clause and enunciated in these decisions were extinguished by the procedure utilized to effectuate the conviction of petitioner. Nothing is more elemental to due process than the right to defend oneself against a crime, for which one's life may become forfeit.

The *sine qua non* of self-defense or justifiable homicide is the reasonable ground of the accused to apprehend a design of some great injury to himself and imminent danger of the accomplishment of that design. (Section 2218(f), Miss. Code Ann. (1952), *infra,* p. 2.) These elements must be evaluated from the perspective of the accused; exclusion of evidence elucidating that perspective successfully emasculates the defense of justifiable homicide, particularly whereas here that issue is considered by a jury. By preventing presentation of such evidence, the court below denied petitioner the right to present a defense. The constitutional injunction, against the preclusion of this right by statute, recognized in *Washington* v. *Texas, supra,*

is equally applicable to the same denial of due process accomplished here by judicial fiat. *Lynumn* v. *Illinois,* 372 U.S. 528, 83 S. Ct. 917 (1963); *Sims* v. *Georgia,* — U.S. —, 87 S. Ct., 17 L. ed. 2d 593 (1967). The procedural statute struck down in the *Washington* case had its genesis in rules of evidence. The court below applied rules of evidence so as to render all defense testimony inadmissible. The effect is the same as in *Washington;* the jury is exposed only to the prosecution's evidence and the right to obtain witnesses vital to the defense is suppressed.

Fragmentation of this single issue into technically subdivided rules of evidence resorted to by the court below for *ad hoc* support of the trial court's rulings does not disguise the real issue or eliminate the federal question.

Given the implicit and essential element of self-defense, i.e., the evaluation of impending harm from the standpoint of the accused, the elimination of the evidence which illuminates appearances presented to an accused and upon which he acted was constitutional error.

Beginning with the issue of excluded testimony, the Court below turned its attention to the nature of Humphrey's pursuit of petitioner. Although the record does not reflect Humphrey's intentions, as indeed it cannot, the Court constructed an attempted "lawful arrest" and metamorphized the substantive issue of the right to defend into a series of unrelated and isolated evidentiary questions, which it disposed of on a variety of grounds.

Mississippi has ample decisional authority precluding the dissection of the issue of the right to defend, into a minutiae of splintered evidentiary rulings. Those elements relating to real or apparent necessity for homicide and to the reasonableness of that belief by an accused are admissible and related to the state of petitioner's mind. *Bell* v. *State,* 42 So. 2d 728 (1949); *King* v. *State,* 65 Miss. 576 (1888); *Evans* v. *State,* 44 Miss. 762, 772-73 (1870); *Lee* v.

State, 160 Miss. 618, 134 So. 185 (1931). That these same elements may or may not be relevant to the activities or state of mind of the decedent is immaterial. The myopic view of the court below is inconsistent with both Federal and State law and requires vacation of the judgment of conviction.

2. The affirmance of the conviction for deliberate murder and direction for execution of the death penalty is totally inconsistent with the legislative direction in Section 2225, Miss. Code Ann. 1942 that an unnecessary killing while resisting an unlawful arrest subjects an accused to no greater charge than manslaughter and with decisions making that section applicable to unlawful arrests by private persons or peace officers. The decision below raises additional constitutional issues requiring review by this Court. It rejects the federal constitutional requisites of probable cause for arrest necessary to satisfy due process of law within the context of the Fourteenth Amendment.

Support for its elaborate dismemberment of the issue of the right to defend into an array of isolated evidentiary questions is posited upon the legalization of an unlawful arrest. The court below stated that Mississippi law supports the thesis that "... a person may resist an unlawful arrest by such force as may be necessary, short of taking human life", and that "... under the facts here presented, the constable was attempting to make a legal arrest." This conclusion is based upon the finding that: "... in the instant case the constable did not begin pursuit of the defendant until *after* the defendant had driven away at such a fast rate of speed his companions became alarmed for their safety", and that single act constituted "reckless driving, a misdemeanor under the statutory law of Mississippi" (6a-7a).

Where federal constitutional rights are involved findings of state courts are not insulated against examination

by this Court. *Spano* v. *New York,* 360 U.S. 315, 316, 79 S. Ct. 1202 (1959); *Thomas* v. *Arizona,* 356 U.S. 390, 393, 78 S. Ct. 885 (1958); *Pierre* v. *Louisiana,* 306 U.S. 354, 358, 59 S. Ct. 536 (1939). Independent examination of the evidence is required to properly evaluate the constitutional questions posed herein.

The conclusions of the Court below are not supported by the record and require scrutiny by this Court. The automobile driven by the petitioner was nine years old in 1965; the owner of the automobile testified that the automobile was incapable of starting with any appreciable degree of speed. The testimony of James Anderson that the car "took off fast" was based upon the fact that the wheels spun as the car started. The top speed of the car, approximately 55 miles per hour, was not reached until just before it stopped and after it had traveled in excess of 500 yards. Smith's fear was caused by the pursuing car and by his conviction that even though they had done nothing, Humphrey would put them in jail or otherwise injure them (R. 1115-16).

The court below has chosen to overlook the uncontroverted evidence that Humphrey's pursuit of the car began *immediately* upon petitioner driving away and failing to respond to the flashing of the light. Anderson testified that Humphrey immediately got into Kitchens' car and began to chase the car driven by the petitioner and that he knew that they were being pursued because of the flashing red light operating on the Constable's car. The law of Mississippi is clear. Probable cause for arrest or for any official act must be evaluated at the commencement of pursuit. Where there is no reason to believe that a felony has been committed, an officer may not make an arrest until it is sufficiently evident that there is taking place in his presence the commission of a crime or an attempted or threatened breach of the peace. In *Smith* v.

State, 240 Miss. 738, 128 So. 2d 857 (1961), the court below stated:

> And an arrest begins when an officer begins his pursuit for the purpose of making an arrest. If an officer does not have the authority to make an arrest at the instant he begins his pursuit for the purpose of making the arrest, the fact that the person the officer is pursuing violates the traffic law in making his escape does not thereby authorize the arrest that began unlawfully, because an officer who attempts an unlawful arrest cannot later arrest a citizen for resisting such trespass.

See also *Butler* v. *State,* 135 Misc. 885, 101 So. 193; *Harris* v. *State,* 209 Miss. 183, 46 So. 2d 194; *Lewis* v. *State,* 198 Miss. 767, 23 So. 2d 401. There having been no violation of the traffic laws prior to commencement of the pursuit, *Smith* v. *State, supra,* is not distinguishable. The reason for the attempt by the court below to distinguish *Smith* v. *State, supra,* becomes apparent when that case is read in conjunction with *Shedd* v. *State,* 203 Miss. 544, 33 So. 2d 816 (1948), which reversed a conviction for murder of a policeman in the case because the defendant had killed an arresting officer while resisting an unlawful arrest. Because of insufficient facts to justify the arrest, § 2225 Miss. Code Ann. (1942) became applicable. Homicide committed while resisting an unlawful arrest subjects an individual to no charge greater than manslaughter. *Bergman* v. *State,* 160 Miss. 65, 133 So. 208 (1931) and *Cryer* v. *State,* 71 Miss. 470 (1893).

The standard imposed by the Fourth Amendment's requirement of probable cause has been stated by this Court:

> If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. *Stacey* v. *Emery,* 97 U.S. at page 645.

The *ex post facto* conversion of an unprovoked pursuit into an attempted lawful arrest is not warranted by the facts.

Probable cause for arrest is a federal question controlled by federal law and circumstances and facts alluded to by the Court below as a basis for an "attempted lawful arrest" are insufficient under the standards imposed by the federal constitution. *Giordenello* v. *United States,* 357 U.S. 480, 78 S. Ct. 1245 (1958); *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684 (1961).

3. Mississippi's process for jury selection, commencing with the elimination of women as potential jurors, reflecting discrimination by the State against Negroes serving as grand and petit jurors and failing to produce prospective jurors representative of the community, violates the equal protection and due process clauses of the Fourteenth Amendment. *Smith* v. *Texas,* 311 U.S. 128, 61 S. Ct. 164 (1941); *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, 66 S. Ct. 984 (1946); *Ballard* v. *United States,* 329 U.S. 187, 67 S. Ct. 261; *Rabinowitz* v. *United States,* 366 F. 2d 34 (5th Cir. 1966).

The statutory exclusion of all women, as incompetent jurors from the grand jury which indicted petitioner and from the venire and petit jury which found petitioner guilty and imposed the death sentence, is in conflict with principles announced by this Court. *Smith* v. *Texas,* 311 U.S. 129 (1940); *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457 (1941); *Thiel* v. *Southern Pacific Co., supra*; *Ballard* v. *United States, supra.* Although only a privilege at common law, the right to trial by a fair and impartial jury in States which provide for trial by jury is, in our democratic society, a deeply rooted fundamental right.

Competence to sit on a grand or petit jury is a matter of individual capacity, not a question of group or class. *Thiel* v. *Southern Pacific Co.,* 328 U.S. at p. 220. This Court has rejected the arbitrary and systematic exclusion from jury service of all wage earners, *Thiel* v. *Southern Pacific Co., supra;* all women, *Ballard* v. *United States,*

supra; all Mexican-Americans, *Hernandez* v. *Texas,* 347 U.S. 475, 74 S. Ct. 667 (1954); and all Negroes, *Strauder* v. *States of West Virginia,* 100 U.S. 303 (1880). Although a State may exclude limited and well defined individuals from jury service, excluded classifications may not be arbitrary or capricious. The systematic exclusion by legislative edict of all females from the grand and petit juries which indicted and convicted petitioner is arbitrary and capricious and constitutes an unreasonable classification. The pertinent Mississipi statute does not create an exemption which otherwise qualified females may elect to accept or waive; rather it constitutes a complete exclusion of all females from jury service. Compare *White* v. *Cook,* 251 F.Supp. 409 (D.C. Ala. 1966) and *Hoyt* v. *Florida,* 368 U.S. 57, 82 S.Ct. 159 (1961). See also *Fay* v. *New York,* 332 U.S. 261, 67 S.Ct. 1613 (1947). In *Hoyt, supra* and *Fay, supra,* this Court found it constitutionally permissible for a state to relieve females from jury service unless they elected to serve. The question of the constitutional impermissibility of excluding all females from jury service previously expressly reserved is answered affirmatively in the *Thiel, Ballard* and *Hernandez* cases.

Females constitute approximately 52 per cent[3] of the voting age population in Mississippi and therefore represent approximately one-half of the potentially eligible jurors; accordingly petitioner was denied a trial by a jury truly representative of a cross-section of the community. As this Court noted in *Ballard* v. *United States, supra,* at 193-94:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, back-

[3] See U.S. Census of Population, Miss. Tables 94-96.

> ground, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury were truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

Moreover, the legislative classification in issue herein, is not a limited exemption but a total exclusion, it is wholly without reason or basis in some rational foundation. *White* v. *Crook,* 251 F. Supp. 409 (D.C. Ala. 1966). In *State* v. *Hall,* — Miss. —, 187 So. 2nd 861 (1966) the Supreme Court of Mississippi held that statutory exclusion of all females from jury service was a reasonable classification in light of the State's public policy to continue their service as mothers, wives, and homemakers and also to protect them from the filth of and noxious atmosphere that so often pervade a courtroom during a jury trial. Assuming the validity of the goal of Mississippi's public policy, the method employed by the State to effectuate its policy *i.e.* total statutory exclusion is unconstitutional.

The right to trial by a fair and impartial jury is a fundamental right preservative of many other rights, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S. Ct. 1064 (1886); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362 (1964), and thus any classification which tends to invade or restrict that right "must be closely scrutinized and carefully confined." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 1083 (1966) and cases cited therein. Mississippi

could achieve its express public policy by allowing females an exemption which they might exercise if they so elected. *Fay* v. *New York, supra; Hoyt* v. *Florida, supra.* Nor is the justification for the state policy consistent with State practices through which women are admitted to hold state offices, are members of the state bar, judges, commissioners and reporters in state courts. Moreover females who choose to are freely admitted to all state courtrooms as spectators as indeed they must be. *In re Oliver, supra.* Weighing the importance of petitioner's right to trial by a fair and impartial jury and the importance of maintaining the purity of the jury system against the extreme method Mississippi has chosen to effectuate its public policy, this Court must conclude that the instant cause presents a serious question concerning the administration of criminal justice. See *Ballard* v. *United States,* 329 U.S. 189; *Hoyt* v. *Florida,* 368 U.S. at p. 58.

Additionally, the Mississippi system for selection of grand and petit jurors violated petitioner's constitutional rights to be indicted and tried by a jury from which Negroes were not excluded by reason of their race. *Strauder* v. *West Virginia, supra; Pierre* v. *Louisiana,* 306 U.S. 354, 59 S. Ct. 536; *Whitus* v. *Georgia,* — U.S. —, 17 L. Ed. 2d 599, 35 L.W. 4176 (decided January 23, 1967).

In 1965, petitioner's first conviction was reversed by the Supreme Court of Mississippi because of racial discrimination in the selection of grand and petit jurors. *Shinall* v. *State,* 187 So. 2d 840 (Miss. 1966). The Court below noted that under Mississippi law only male citizens over 21 years of age whose names appear on the poll books and who have paid their poll tax are qualified jurors in Forrest County (Mississippi Code Annotated § 1762 *et seq.*) and as the registrar of Forrest County had engaged in a pattern and practice of racial discrimination against qualified Negro applicants, Negroes were not registered as voters prior to July of 1965 and hence could not possibly serve

on a grand or petit jury in that county. *United States* v. *Lynd*, 349 F. 2d 785 (5th Cir. 1965); *United States* v. *Lynd*, 349 F. 2d 790 (5th Cir. 1965). In affirming petitioner's subsequent conviction the Court below held that:

> The evidence in this case shows that the Supervisors of Forrest County are now selecting juries from the list of qualified voters of that county without regard to race or ethnic groups, and that the constitutional impediment of discriminatory jury selection for which this case was previously reversed has been removed. All qualified persons desiring to vote are not being registered by the Circuit Clerk of Forrest County, and from this list juries are now being drawn. (a) The argument that the juries are still being selected as they have been for years is not well-taken because the list from which the juries are now selected is a new list of qualified voters, including Negro citizens who have registered to vote (5a).

Independent inquiry and determination of disputed facts is required in order to protect and enforce the federal right asserted. *Pierre* v. *Louisiana, supra; Norris* v. *Alabama*, 294 U.S. 587, 55 S. Ct. 579 (1935); *Whitus* v. *Georgia, supra.*

An examination of the record reveals that the jury commissioners selected potential jurors from substantially the *same* voting rolls of qualified electors that had been condemned by the Fifth Circuit in *United States* v. *Lynd, supra,* (R. 67, 77, 80, 89). The only difference between the voting rolls at the time the Fifth Circuit decided *United States* v. *Lynd, supra,* and April of 1966 when the grand jury was assembled is the addition to the rolls of approximately 1445 Negroes out of a potential of 7,595 Negro voters. Out of that 1445, only 534 were males and therefore qualified for jury service.[4] Moreover, at the time the

[4] Statistics from monthly reports filed pursuant to injunction in *U. S.* v. *Lynd, supra.*

grand and petit juries in question were selected, a qualified elector was one who was a registered voter who was not delinquent in his poll tax payments (R. 93). In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966), this Court held the Virginia poll tax unconstitutional as a violation of the Equal Protection Clause. Similarly wealth is a totally capricious and irrelevant factor to any valid juror qualification. The requirement that registered male voters be current in poll tax payments before they were eligible for jury service constitutes one more unlawful qualification for jury service. It was not until April 7, 1966, that Mississippi was ordered to cease requiring the payment of poll taxes as a prerequisite to voting and to jury service, *United States* v. *State of Mississippi* (U.S.D.C. Miss. unreported) approximately the same time that the jury commissioners compiled the jury list for the instant cause. See Mississippi Code Ann., 1942 § 1766. In June of 1967, the Attorney General of the United States found sufficient discrimination against Negroes to certify that federal registrars were necessary in Forrest County to effectuate the command of the Fifteenth Amendment.

There still exists in Forrest County, Mississippi State, discrimination against Negro citizens which prevents them from registering to vote and denies them their resulting right not to be excluded from jury service on the basis of race. During the short period that federal registrars have been operating in Forrest County, the names of 734 qualified Negro citizens who were heretofore denied registration have been placed upon the voting rolls. See *Report of Civil Service Commission Cumulative Totals On Voting Rights Examining*. In effect, Forrest officials have allowed some Negroes to register and therefore to be ineligible for jury service while still denying these rights to most Negro citizens of Forrest County. Practices of token representation similar to the one disclosed in the

instant cause were condemned in *Pierre* v. *Louisiana, supra* (one Negro called within memory); *Smith* v. *Texas, supra* (eighteen Negroes called in seven years); *Patton* v. *Mississippi*, 332 U.S. 463, 68 S.Ct. 184 (1947) (three Negroes called in thirty years); *Cassell* v. *Texas*, 339 U.S. 282, 70 S.Ct. 629 (1950) (twenty-one Negroes called in six years); *Reece* v. *Georgia*, 350 U.S. 85, 76 S.Ct. 167 (1955) (six Negroes called in eighteen years); *Arnold* v. *North Carolina*, 376 U.S. 773, 84 S.Ct. 1032 (1964) (one Negro called in twenty-four years); *Eubanks* v. *Louisiana*, 356 U.S. 584, 78 S.Ct. 970 (1958) (one Negro called in eighteen years). The Constitution nullifies all forms of invidious discrimination. *Gomillion* v. *Lighfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); *Smith* v. *Texas*, 311 U.S. 128, 132.

Notwithstanding the fact that the above discriminatory practices by state officials limited the number of potential Negro jurors to 534, the jury commissioners drew a special venire of 79 prospective jurors of which the amazing number of 14 were Negroes, a statistical improbability. Of the 14 Negroes who were called, 9 were dismissed for cause while the remaining 5 fell victim to the only peremptory challenges exercised by the State. Thus, although a highly suspectable number of Negroes were called, none survived to serve on the jury. *Cf. Collins* v. *Walker*, 329 F.2d 100 (1964), second petition for rehearing denied, 335 F.2d 417 (5th Cir. 1964), cert. denied, 379 U.S. 901 (1964).

The racially discriminatory system of selection utilized in the instant cause should be reviewed by this Court to determine if petitioner has been denied the equal protection of the laws. In *Whitus* v. *Georgia, supra*, this Court reversed a murder conviction because the jury selection utilized by the State of Georgia was contaminated by the continued presence, albeit in a modified form, of past discrimination practices. So too, in the instant case, Mississippi secured petitioner's indictment by a grand jury

and conviction by a petit jury while utilizing modified forms of past discriminatory state practices to exclude many Negroes from service, solely because of their race or color. Under the decision and principles so recently announced by this Court in *Whitus* v. *Georgia, supra,* this petition must be granted and the conviction reversed.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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